No. 15-2801(L)

15-2805 (Con)

United States Court of Appeals for the Second Circuit

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL,
PLAINTIFF-COUNTER-DEFENDANT-APPELLANT

AND

NATIONAL FOOTBALL LEAGUE, DEFENDANT-APPELLANT

v.

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,
ON ITS OWN BEHALF AND ON BEHALF OF TOM BRADY,
DEFENDANT-COUNTER-CLAIMANT-APPELLEE

AND

TOM BRADY, COUNTER-CLAIMANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, NOS. 15-5916, 15-5982

BRIEF OF U.S. LABOR LAW AND INDUSTRIAL RELATIONS PROFESSORS AS AMICUS IN SUPPORT OF PETITION FOR PANEL REHEARING AND REHEARING EN BANC

[*cover continued on next page*]

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amici Scholars of Labor Law and Industrial Relations are prominent academic experts in labor law, grievance-arbitration, and industrial relations, and have joined to share their considerable expertise concerning the workplace, in general and in the context of professional sport:

Lee H. Adler, is a lecturer at Cornell University's School of Industrial and Labor Relations;

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Andrew Zimbalist, Robert A. Woods Professor of Economics, Smith College.

These scholars have written extensively about US labor law, grievance-arbitration, and industrial relations and in the context of professional sport arbitration. Based on their research of labor-dispute resolution, *amici* believe that the panel's decision runs contrary to fundamental principles long settled by the Supreme Court.[1]

[1] No party's counsel authored this brief in whole or in part. No party, no counsel for any party, and no person other than amici curiae or their counsel contributed money that was intended to fund preparation or submission of this brief. Fed. R. App. P. 29(c)(5)(A)-(C).

THE PANEL'S DECISION CONFLICTS WITH DUE PROCESS PRINCIPLES EXPLAINED IN THE *STEELWORKERS* TRILOGY

A. An Agreement To Arbitrate Is Not an Agreement to An Unfair Process

NFL Commissioner Roger Goodell improperly exercised his authority as an arbitrator here when he upheld on appeal his own suspension of Tom Brady on grounds different from the ones justifying the original decision, failed to explain how that decision fit into generally accepted principles for industrial due process, and ignored NFLPA arguments that were grounded in the parties' agreement. The panel opinion upheld Goodell's arbitral decision, notwithstanding these infirmities.

This case presents a significant question of national labor law: When parties agree to arbitrate, do they also agree to an arbitrary process where that arbitrator may transform an appellate proceeding into a trial de novo, ignore generally accepted principles of industrial due process, and ignore arguments grounded in the collective-bargaining agreement ("CBA")? If courts allow arbitrators to ignore the CBA's "appellate" limitations or the parties' arguments (and the probative CBA language cited in support of those arguments), parties will no longer be able to trust arbitration as a fundamentally fair process, thereby discouraging its use as a dispute-resolution method that protects industrial peace. If left uncorrected, this decision may destroy the very process that the Court wishes to protect – the peaceful resolution of labor disputes through a non-arbitrary and fair proceeding.

B. Courts Must Vacate Arbitral Awards That Do Not Draw Their Essence From the CBA

1. *To promote industrial peace, the Supreme Court upheld labor and management agreements to arbitrate their disputes as part of a non-arbitrary and fair process in return for unions surrendering their right to strike*

Over half a century ago, the Supreme Court, in the *Steelworkers* Trilogy, three decisions penned by Justice Douglas and issued on the same day, outlined the importance of labor arbitration in avoiding industrial strife and promoting industrial peace.[2] Indeed, by the time the Court drafted the Trilogy, it had already explained that "the agreement to arbitrate grievance disputes [wa]s the quid pro quo for an agreement not to strike." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957). The Court further described, in *Enterprise Wheel & Car*, that in return for surrendering the right to strike, unions were entitled to a certain standard for labor arbitration. That vision for labor arbitration, a process that should inure to the benefit of both labor and management, is largely based on the description of a non-arbitrary and fair process contained in the famous Holmes lecture by Yale Law School Dean Harry Shulman. *See* Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

2. *Arbitrators are forbidden from dispensing their own brand of industrial justice*

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[2] *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The decisional authority granted arbitrators by the Steelworkers Trilogy has a significant limitation. The arbitrator's award "is legitimate only so long as it draws its *essence* from the collective bargaining agreement." *Enterprise Wheel & Car Corp.,* 363 U.S. at 597. The Court added that, "[w]hen the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." *Id.* The purpose of this requirement is to ensure that the arbitrator understands that "he does not sit to dispense his own brand of industrial justice." *Id.* This is especially true in cases where the conditions for deference to the arbitrator – neutrality, expertise, or trust – do not hold.

3. To avoid having a reviewing court vacate the arbitral award, an arbitrator should show how his or her decision fits within well-established standards for justice

"Few things are more significant to employees than limitations on their employer's power to discipline or discharge them." Roger Abrams & Dennis Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 594 (1985). For discipline to be just, there must be a good reason for discipline; a legitimate managerial interest that is furthered; and procedural fairness. *Id.* The just cause standard has developed meaning over the years through its application in specific cases. Arbitrators faced with applying its general language have access to a rich body of decisional law supported by arbitral opinions.

By now much of the well-recognized jurisprudence of just cause pertains to the procedures that management, seeking to discipline workers, must apply. To a large

extent the practical significance of the essence standard in discipline cases has been to require arbitrators to determine the meaning of contractual language by reference to the established jurisprudence of penalties and infractions as applied in previous cases. An opinion that follows precedent and is based on the established jurisprudence of arbitration, in fact draws its essence from the agreement. This standard is consistent with the basic policy behind the essence standard. So long as the arbitrator is seeking to be consistent with the decisions of other arbitrators or judges he or she is not attempting to "dispense his own brand of industrial justice." There is little reason to conclude that Commissioner Goodell was operating under a different or more lenient procedural standard. His opinion contains no such claim. Indeed he stated that "I am very much aware of, and believe in, the need for consistency in discipline for similarly situated players."

4. Commissioner Goodell's Award Does Not Constitute Just Cause Because It Fails To Meet Standards for Industrial Due Process

Goodell's award falls far short of the mark with regard to procedural justice. As Abrams and Nolan explain, "[t]he concept of just cause includes certain employee protections that reflect the union's interest in guaranteeing 'fairness' in disciplinary situations." Most importantly, employees are entitled to industrial due process. Here, this means that employees, such as Brady, are entitled to:

> [1] a. actual or constructive notice of expected standards of conduct and penalties for wrongful conduct;
>
> b. a decision based on facts, determined after an investigation that provides the employee an opportunity to state his case, with union

assistance if he desires it;

c. the imposition of discipline in gradually increasing degrees, . . .

2. The employee is entitled to *industrial equal protection*, which requires like treatment of like cases. . . .

It is a critical error that the opinion by Commissioner Goodell, a non-expert, non-experienced and non-neutral arbitrator, makes no effort to follow or apply the established rules of fair and consistent process. He never adverts to the decision of established labor arbitrators or judges as to the disciplinary process under a collective-bargaining relationship. It is difficult to avoid the conclusion that his failure to do comprises the fatal arbitration error of seeking to impose his own brand of industrial justice.

Goodell's decision bears all the hallmarks of an arbitrator dispensing his own brand of industrial justice. He quickly, with little discussion and no citation, rejected the remedial precedents offered by the NFLPA. He concluded, without reference to outside sources, that Brady's dereliction should be analogized to taking a performance-enhancing drug in violation of league rules. *See* Special Appendix 57.

No authority is cited for the conclusion that deflating footballs should be treated like taking performance-enhancing drugs. A key difference between the two situations is that the NFLPA agreed to the penalty for steroid use as part of the collective-bargaining process; the NFLPA had no voice in establishing this particular penalty for deflating footballs. The Union did, however, have a voice in establishing the penalty schedule, which Goodell ignored. There are other significant differences between taking

drugs and deflating balls. Taking performance-enhancing drugs often involves criminal law violations, which is not true of deflating footballs. *See NFL Mgmt. Council v. NFLPA*, ___ F.3d ___, 2016 WL 1619883, *19 (2d Cir. 2016). By equating the two situations without reference to any authority and without discussion as to why the bargained-for remedies did not apply, the Commissioner applied his own brand of industrial justice.

Not only did the Commissioner, as arbitrator, take action without precedent but he also ignored existing rules of arbitration generally recognized in the jurisprudence of just cause as necessary to justify penalties. For example it is a staple of arbitral jurisprudence that a disciplined employee is entitled to know precisely what he is charged with and the employer may not seek to justify punishment by altering the initial charge. In Brady's case the arbitrator on his own expanded the charge and used the expanded finding as a basis for justifying the penalty. *See NFL Mgmt. Council v. NFLPA*, 129 F. Supp.3d. 449, 461 (S.D.N.Y. 2016); *see also NFL Mgmt. Council v. NFLPA*, ___ F.3d ___, 2016 WL 1619883, *21 (2d Cir. 2016) (C.J. Katzmann, dissenting) (pointing out how the Commissioner failed to treat like cases alike).

CONCLUSION

The panel's decision empowers arbitrators to ignore the parties' arguments and CBA-imposed limitations on their power, and denies recourse to parties that have suffered even the most egregious violations of industrial due process. In so doing, the panel distorts labor arbitration into an unfair and arbitrary process of dispute resolution that will force both workers and management to think twice before agreeing to arbitrate

a dispute. The full court should grant rehearing to correct the panel's errors and ensure that labor arbitration remains one of the greatest accomplishments of modern industrial relations.

May 31, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND TYPE STYLE REQUIREMENTS

I hereby certify that this *amicus* brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font. In addition, this brief complies with the limitation on length set by Federal Rule of Appellate Procedure 29(d) and 35(b)(2).

Dated: May 31, 2016

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